United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1916 B

PLS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES JAYCEES, INC.
and NEW YORK STATE JAYCEES, INC.,

Appellants,

v.

Docket No. 74-1916

THE NEW YORK CITY JAYCEES, INC.,

Appellee.

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

There is no disagreement among the parties as to the basic facts[1/] which are material to this Court's resolution of the instant appeal:

1/ Similarly, the appellants, with one exception, do not challenge the trial court's findings of fact. In their opening brief the appellants noted that to the extent the trial court found that the National Advisory Council of Together, Inc. controls the United States Jaycees (called by the trial court and appellees "National") and the United States Jaycees Foundation it is "clearly erroneous." (Brief of Appellants, pp. 26-27.) The appellee appears to agree since it argues that the trial court found only that the (cont'd)

1. The Jaycees appellants are civic organizations which are exempt from income taxation pursuant to Section 501(c)(4) of the Internal Revenue Code. The automonously functioning Foundation is exempt from federal taxation by reason of Section 501(c)(3) of the Internal Revenue Code.

2. The Jaycees holds grants and contracts from agencies of the federal government, amounting to 31.4% of the total 1974 fiscal year budget of the national organization, which provides funds specifically earmarked for defined projects and expressly limits the use of the funds to such projects.

3. The Jaycees limits membership to males.

4. The Jaycees threatens to terminate the affiliation of appellee local chapter because it decided that it would not abide by the policy limiting membership to males.

1/ (cont'd) Council controls the selection of recipients of seed grants under the Mainstream project, not the Jaycees or the Foundation (Brief of Appellee, pp. 20-21). Appellants agree that the facts are that the Council controls only selection of seed grant recipients but, unlike appellee, we think the trial court went further and erroneously found control of the Jaycees and the Foundation by the Council (See Appendix A-400). Apparently, the appellee would agree that this Court should disregard such a finding. See Brief of Appellants, p. 27.

5. The government does not underwrite, dictate, influence or review the internal membership policies of the Jaycees.

6. There is no discrimination on the basis of sex or any other characteristic among beneficiaries of the projects funded by the government.

If, as the Jaycees contends, these facts are insufficient to demonstrate "state action" in the membership policies of the Jaycees, the District Court erred as a matter of law in entering the preliminary injunction. Therefore, contrary to appellee's contention, the standard of review in this case is not whether the decision of the District Court is an "abuse of discretion" or "clearly erroneous." (Brief of Appellee at p. 13.) Where the propriety of preliminary injunction rests on a question of law, the issue on appeal is "whether the judge below was wrong . . . ." McLeod v. Local 282, International Bro. of Teamsters, Inc., 345 F.2d 142, 145 (2d Cir. 1965). The Jaycees submit that the decisions of this Court which define the crucial distinction between private conduct and "state action" require that the decision below be reversed.[2/]

2/ Since this appeal raises the fundamental issue of "state action" (i.e., the applicability of constitutional standards in the present case), there is no need to consider two (cont'd)

I. The Jaycees' Receipt of Government Funds Does Not Constitute State Action Since There Is No Causal Relationship to the Injury Claimed by Appellee

It is well established in this Circuit that government financial support of an institution does not amount to "state action" unless the government is "involved as a participant" in the alleged discrimination, i.e., the critical involvement of the government must be "in the very 'discriminatory action under constitutional attack.'" Grossner v. Trustees of Columbia University, 287 F. Supp. 353, 548 (S.D. N.Y. 1968); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1937); Wahba v. New York University et al., 492 F.2d 96, 101 (2d Cir. 1974); Barrett v. United Hospital et al., 376 F. Supp. 791, 801-802 (S.D. N.Y. 1974). Other circuits have also required a nexus between government support and the alleged wrong. Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973); Browns v. Mitchell, 409 F.2d

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2/ (cont'd) additional issues discussed at length in Brief of Appellee: (1) whether sex, like race, should be considered an inherently suspect classification (but see Brief of Appellants, p. 14, fn. 6; and (2) whether the Jaycees membership policy is, by some standard, reasonable.

593, 596 (10th Cir. 1969); Fletcher v. Rhode Island Hospital Trust & National Bank, 496 F.2d 927 (1st Cir. 1974). In addition, the Supreme Court has ruled that the government "must have 'significantly involved itself with invidious discriminations' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).[3/]

The appellee attempts to distinguish the Second Circuit cases on the ground that they involve questions of due process rather than discrimination. (Brief of Appellee, p. 15). However, where the state action standard is satisfied, the conduct of the actor is considered to be conduct of the government. Surely the government can no more deny its citizens due process than it can subject them to invidious discrimination. See Moose Lodge, supra.

While appellee does not contend that there is any discrimination among the beneficiaries of the specific programs for which the Jaycees receives government funds,[4/] it

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3/ It is difficult to appreciate appellee's attempt to distinguish Moose Lodge as a case involving the "mere issuance of a license." (Brief of Appellee, p. 16). In Moose Lodge, it was conceded that "without a liquor license a fraternal organization would be hard pressed to survive." Id. at 183 (Douglas, J., dissenting). By contrast, the Jaycees existed for over 50 years without participating in any federal grants or contracts, or otherwise receiving federal funds.

4/ The nearest the appellee comes to a contention that there is discrimination against beneficiaries of these programs is that if the appellee loses its Jaycee charter and if (cont'd)

argues that the government may not use an organization which discriminates as to membership because this associates the government with conduct which is forbidden to public authority. This argument simply ignores the standards for determining state as opposed to private action prescribed in the decisions of this Court. See Powe v. Miles, supra; Grafton v. Brooklyn Law School, supra; Wahba v. New York University, supra.

Moreover, this same argument was pressed upon the Tenth Circuit by other complainants against the internal membership policies of the Jaycees. Junior Chamber of Commerce of Rochester, Inc. v. The United States Jaycees, 495 F.2d 883 (10th Cir. 1974). That court addressed the argument in relation to state government funds as well as federal funds. As to the former, it said:

> The plaintiffs would have us rule that because the Jaycees are used by the state government to dispense funds on its behalf that all their conduct automatically becomes state action subject to a § 1983 suit regardless of whether there exists discrimination by the private entity in the dispensing of the funds. In effect, then,

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4/ (cont'd) further funds are denied to it and if no other organization in New York City receives such funds the beneficiaries may be denied program benefits. (Brief of Appellee, pp. 19-22). Such distended speculation was not even indulged in by the District Court in support of its decision; it found no discrimination anywhere except in internal membership policies.

> plaintiffs say that the state must, consistent with the Constitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged state action. We disagree. (495 F.2d at 887).

In regard to state action from federal funding, the Tenth Circuit said:

> . . . [T]he question is whether the United States is obligated to see to it that the United States Jaycees' conduct shall be exemplary quite apart from its administering of programs and governmental funds. No case has been cited which extends to this length. On the contrary, the criteria announced by the Supreme Court have tended to require that the alleged unconstitutional conduct relate specifically to governmental action. (495 F.2d at 888).

In the Tenth Circuit case, several agencies of the federal government were made defendants along with the Jaycees. Significantly, the United States has consistently supported the position of the Jaycees on the issue of "state action."[5/]

As the foregoing decisions recognize, the government has some involvement with every organization and individual

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5/ For the convenience of the Court, we have attached a copy of the Memorandum filed by the United States in opposition to the petition for certiorari in Junior Chamber of Commerce of Rochester, Inc. v. The United States Jaycees, No. 73-2025, 73-2028, at Appendix A to this brief. The discussion of the issue of "state action" appears at pp. A1-6. This memorandum also demonstrates that, contrary to appellee's assertions (Brief of Appellee, p. 3), the relevant facts of that case and the present appeal are identical.

in the nation. If this involvement alone, without requiring a relationship to the injury alleged, permits the application of constitutional standards, the "essential dichotomy" between private and government conduct would have no meaning. See Civil Rights Cases, 109 U.S. 3 (1883); Note, "State Action and The Burger Court," 60 Va. L. Rev. 840, 849-51 (1974). The only "nexus" here is between government funds and the specific programs for which they are granted. There is no discrimination in the conduct of such programs. The appellee complains only of internal membership policies which do not involve the government either in funds or policy. A nexus simply does not exist between the government and such policies.

Appellee attempts to circumvent the necessity of demonstrating a nexus between the activity complained of and the government involvement by directing attention at those programs and activities of the Jaycees which are funded in part or in whole by the government. The appellee argues that in these government funded programs the Jaycees perform

functions which are governmental in nature and that this renders even the unrelated activities of the Jaycees "public functions."[6/] (Brief of Appellee, pp. 25-27).

However, even assuming that the Jaycees perform a public function, this does not obviate the necessity of demonstrating a nexus between the activity complained of and the government involvement. A public function is significant to a given case only if the public function is itself the subject of an attack and a nexus between that public function and the government involvement is demonstrated. Barrett v. United Hospital et al., supra, 375 F. Supp. at 799; Powe v. Miles, supra, 407 F.2d at 80; Grafton v. Brooklyn Law School, supra, 478 F.2d at 1140-1141; Grossner v. Trustees of Columbia University, supra, 287 F. Supp. at 549; Lloyd Corporation Ltd. v. Tanner, 407 U.S. 551, 562-564 (1972).

As Judge Bauman stated in Barrett when he refused to apply the public functions concept to a private hospital:

> That doctrine has heretofore been limited in its application to situations where the constitutional violation alleged occurred in the very activity in which the private institution performed its "tra-

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6/ The Jaycees disputes the characterization of its activities as "public functions." Certainly the programs conducted by the Jaycees are less like traditionally governmental activities than the provision of education or hospital services. See, e.g., Powe v. Miles, supra; Grossner v. Trustees of Columbia University, supra; Barrett v. United Hospital, supra.

> ditionally governmental function." 7/ This is not the case here. Even if it may be successfully argued that a private hospital is performing a public function it is clear that the function involved is the admission and treatment of patients, not the hiring and firing of doctors, nurses and other staff personnel. 8/ I find no compelling authorities for extending the "public function" argument to a private hospital in the absence of a nexus between the governmental function performed and the violative activity alleged. 9/

In this case appellants have not demonstrated any nexus between the alleged public functions performed by the Jaycees and the challenged internal membership policies. Any public functions performed by the Jaycees relate to the specific programs funded by the government and not to the internal membership policies of the Jaycees. (Brief of Appellants, pp. 24-26). There is no discrimination in the delivery of

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7/ Evans [v. Newton, 382 U.S. 296] dealt with the "use" of a municipal park, Marsh [v. Alabama, 326 U.S. 501] and Logan Valley [Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308] with the "use" of sidewalks and Terry [v. Adams, 345 U.S. 461] with exercise of the right to vote. In all four the activity in which the complained of conduct took place was the very one which had been judicially determined as being "governmental in nature."

8/ (omitted)

9/ (omitted) (376 F. Supp. at 799, bracketed matter added)

services in these specific programs. Appellees complaint goes only to the unrelated internal membership policies of the Jaycees; therefore, any public functions of the Jaycees have no relevance to appellees' complaints.

The appellee has failed to cite a single case dealing with the membership of an organization found to be performing public functions. Magro v. Lentine Bros. Moving, 338 F. Supp. 464 (E.D. N.Y. 1971) raised the question whether a judicial sale pursuant to a statutory lien is "state" action and the court found it unnecessary to reach the issue; Norwood v. Harrison, 413 U.S. 455 (1973) involved the racially discriminatory distribution of school textbooks furnished by the state; Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967) relates to racial discrimination in public education; Evans v. Newton, supra, addresses the exclusion of blacks from use of a municipal park; Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) is the celebrated case involving racial discrimination in service by a restaurant located in a public parking building; Smith v. Young Men's Christian Association, 316 F. Supp. 899 (M.D. Ala. 1970) involves the exclusion of blacks from use of recreational facilities supported by a municipality; and Pennsylvania v. Brown, 270 F. Supp. 782

(E.D. Pa. 1967) held that the exclusion of non-whites from admission to Girard College pursuant to the terms of a trust violated constitutional prohibitions on racial discrimination in public education. Every one of these cases deal with the use of public property or authority; none involves the internal membership policies of the organizations operating or dispensing the public property or authority.

II. Tax Exemptions Accorded The Jaycees Do Not Result in State Action

The District Court did not base its state action holding on tax exemptions accorded the Jaycees. (See Appendix A-401). Nevertheless, appellee urges tax exemptions as a ground for concluding there is state action and cites racial discrimination cases in support. (Brief of Appellee, p. 30). Tax scholars have demonstrated the deficiencies in these decisions. See, Bittker & Kaufman, Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code, 82 Yale L. J. 51 (1972). Aside from that, the courts have restricted the holdings to cases of racial discrimination. See, Marker v. Shultz, 485 F.2d 1003, 1006-1007 (D.C. Cir. 1973); Jackson v. Statler Foundation, 496 F.2d 623 (628-629), 635 (1974).

The nexus requirement is fully applicable to claims that tax exemptions constitute state action. See, Barrett v. United Hospital, et al., supra, 376 F. Supp. at 801-802; Crafton v. Brooklyn Law School, supra; Grossner v. Trustees of Columbia University, supra, 287 F. Supp. at 547-548. Moreover, the reasoning of the Supreme Court in Walz is also applicable. See, Marker v. Shultz, supra, 485 F.2d at 1006-1007; Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune Co., 435 F.2d 470, 477 (7 Cir. 1970); McCoy v. Shultz, 73-1 U.S.T.C. ¶ 9233 (D.D.C. 1973). In Walz v. Tax Commission, 397 U.S. 664, 675 (1970), the Supreme Court held that the tax exemptions to religious organizations fall far short of the relationship between church and state proscribed by the First Amendment, for a tax exemption is "not sponsorship" and "no one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.'" Similarly, the tax exemptions received by the Jaycees are not sponsorship of the organization by the government, and they do not convert the Jaycees into an arm of the state. They do not amount to state action. See Junior Chamber of Commerce of Rochester, Inc., et al. v. The United States Jaycees, et al., 495 F.2d at 888.

III. The Appellee Has Failed to Demonstrate That The District Court Had Personal Jurisdiction Over the United States Jaycees

Before the District Court the appellee argued, as it does here, that there is personal jurisdiction over the United States Jaycees under Sections 301 and 302 of N.Y.C.P.L.R. (Appendix A-388).[10/] The District Court asserted jurisdiction only under Section 301 and appellants have shown the error of that assertion (Brief of Appellants, pp. 28-33).

The appellee's effort to establish jurisdiction[11/] is erroneous for the following reasons:

1. Section 301, N.Y.C.P.L.R., adopts the traditional "doing business" test. The District Court's holding that the United States Jaycees is doing business in New York is contrary to the leading New York decision of Delagi v. Volkswagenwerk A. G. of Wolfsburg, Germany, 29 N.Y. 2d 426, 328 N.Y.S. 2d 653, 278 N.E. 2d 895 (1972), as shown in the Brief of Appellants, pp. 30-33. The appellee's attempt to distinguish Delagi as involving suit by a third party, raises a distinction without a difference (See, Brief of

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10/ For the convenience of the court, Sections 301 and 302 of N.Y.C.P.L.R. are attached to this brief as Appendix B.

11/ Brief of Appellee, pp. 38-50.

Appellee, pp. 40-41). The statutory test is "doing business" and the content of the test is the same whether suit is brought by a third party or anyone else. The only way the United States Jaycees can be present in New York is through its dealings with plaintiff-appellee. As Delagi shows, those dealings are not sufficient to give the United States Jaycees a presence in New York for jurisdictional purposes.

2. Section 302(a)(1), N.Y.C.P.L.R., bases jurisdiction on the transaction of business in New York. The District Court correctly did not assert jurisdiction under this provision. As appellants have shown, regardless of how liberal an interpretation is placed upon the transacting business standard, the United States Jaycees has simply not had the minimal contacts with the state necessary to subject it to suit in New York consistent with due process requirements. (Brief of Appellants, pp. 32-33).

3. Although the District Court also did not find jurisdiction under Section 302(a)(2) and 302(a)(3), N.Y.C.P.L.R., the appellee continues to claim these provisions are applicable. These sections extend jurisdiction to out of state defendants for tortious acts committed inside the state or outside the state under prescribed circumstances. Assuming arguendo that all other requirements are met, the provisions

are still not applicable because the appellee's claim does not amount to a tort. The claim here is for alleged violation of constitutional rights (Appendix A-392). Although the Courts have allowed claims for damages for deprivation of constitutional rights, they have distinguished such claims from torts. See Bivens v. Six Unknown Named Agents of Fed. Bur. Narc., 403 U.S. 388, 390-391, 394, 394 fn. 7, 397 (1971); United States ex rel. Moore v. Koelzer, 457 F.2d 892 (3 Cir. 1972); Butler v. United States, 365 F. Supp. 1035, 1040, 1045 (D. Ha. 1973). These rights have been accorded against the background of torts but the remedy is not for a tort any more than statutory remedies under the Securities Exchange Act[12/] or the Interstate Commerce Act[13/] may be labeled torts.

Conclusion

The question on this appeal is whether the District Court was wrong in concluding that the internal membership policies of the Jaycees are "state action" and, therefore,

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12/ Gratz v. Claughton, 187 F.2d 46, 49 (2 Cir.) cert. denied 341 U.S. 920 (1950); Smolowe v. Delendo Corp., 136 F.2d 231, 235 (2 Cir.), cert. denied 320 U.S. 751 (1943).

13/ T. I. M. E., Inc. v. United States, 359 U.S. 464 (1959).

subject to the Fifth Amendment. Since there is no connection between these policies and the grants, contracts and tax exemptions received from the government by the Jaycees, there can be no state action. The District Court was wrong.

In addition, the United States Jaycees is not subject to in personam jurisdiction in New York where it maintains no office and has no agent.

For these reasons, the decision should, it is respectfully submitted, be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2025

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC., ET AL., PETITIONERS

v.

THE UNITED STATES JAYCEES, ET AL.

No. 73-2028

JUNIOR CHAMBER OF COMMERCE OF PHILADELPHIA, PA., ET AL., PETITIONERS

v.

THE UNITED STATES JAYCEES, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners brought this action against the United States Jaycees, certain state and local Jaycee organizations and foundations,[1] and seven federal

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[1]In addition to the United States Jaycees, the private defendants include the New York State Jaycees, the Pennsylvania State Jaycees, the Louisiana Junior Chamber of Commerce, Inc., the Downtown Chapter of the District of Columbia Jaycees, Maine State Jaycees, Junior Chamber of Commerce of Orrington, Inc., the United States Jaycees Foundation, the Jaycees Mental Health and Mental Retardation Fund and the Jaycees War Memorial Fund.

officials and agencies.[2] They alleged that the Jaycees' exclusion of women from membership constituted unconstitutional sex discrimination by state action, on the ground that the Jaycees are closely related to government regulation and funding. More particularly, petitioners contended that by granting tax exempt status to the Jaycee organizations (and their associated foundations), the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Internal Revenue Service have endorsed and subsidized the Jaycees' discriminatory membership policy. Petitioners assert similar arguments against the Secretary of Labor, the Secretary of Housing and Urban Development, the Administrator of the Environmental Protection Agency, and the Director of the Office of Economic Opportunity, who have allowed the Jaycees to participate in the administration of various federally-funded programs.

Petitioners sought injunctive relief to require the termination of tax-exempt status of any organization whose membership discriminates on the basis of sex and the termination of any federal grants or programs which are administered through sex-segregated organizations. The district court granted the government's motion to

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[2]The federal defendants are the Secretary of the Treasury, the Internal Revenue Service, the Commissioner of Internal Revenue, the Secretary of Housing and Urban Development, the Secretary of Labor, the Director of the Office of Economic Opportunity and the Administrator of the Environmental Protection Agency.

dismiss,[3] and the court of appeals affirmed. While the court of appeals indicated that federal jurisdiction was questionable (Pet. No. 73-2025, p. A-7), its affirmance was based upon its determination that the discrimination complained of did not involve state or federal action (Pet. No. 73-2025, pp. A-8 to A-12).

1. The decision below that the challenged discrimination did not constitute state action accords with *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163. There, the Court stated (p. 173) that "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' * * * in order for the discriminatory action to fall within the ambit of the constitutional prohibition." Here, as the court of appeals concluded (Pet. No. 73-2028, pp. 10a-12a), there is no significant government involvement with the Jaycees membership policy.

The United States Jaycees ("Jaycees") is a nonprofit, civic-oriented organization, with affiliated state and local chapters. They are exempt from federal income taxation as "civic organizations" under Section 501(c)(4) of the Internal Revenue Code of 1954, while the three private foundations established by the Jaycees, which were joined as defendants, are exempt as charitable organizations under Section 501(c)(3). This federal tax-exempt status does not, standing alone, constitute significant government involvement in the Jaycees' exclusionary membership policy within the meaning of the *Moose Lodge* case. Indeed, as the Court observed in *Walz* v. *Tax Commission*, 397 U.S. 664, 675-676, a tax exemption does not constitute government "sponsorship" but rather creates

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[3]The government had moved to dismiss on the grounds that (1) the suit was barred by sovereign immunity, and (2) the complaint failed to state a claim upon which relief might be granted. In sustaining the government's motion to dismiss, the district court did not indicate whether it was relying on the jurisdictional ground raised by the government or the failure to state a claim. With respect to the private defendants, however, it expressly dismissed for failure to state a claim (Pet. No. 73-2025, pp. B-3 to B-4).

"only a minimal and remote involvement." Accord: *Marker* v. *Shultz*, 485 F. 2d 1003 (C.A.D.C.); *Browns* v. *Mitchell*, 409 F. 2d 593 (C.A. 10); *Bright* v. *Isenbarger*, 314 F. Supp. 1382 (N.D. Ind.), affirmed, 445 F. 2d 412 (C.A. 7); *Blackburn* v. *Fisk University*, 443 F. 2d 121 (C.A. 6); *McCoy* v. *Shultz*, 31 A.F.T.R. 2d 858 (D.D.C., decided February 13, 1973).[4]

Similarly, the Jaycees' participation in the administration of various federal grants and public assistance programs[5] does not rise to the level of governmental involvement in the exclusionary membership policy attacked by petitioners. With respect to such federal grants or contracts, the Jaycees act only as a conduit through which the federal programs are implemented on a local level. In contrast to the textbook grant to racially-segregated schools struck down in *Norwood* v. *Harrison*, 413 U.S. 455, and the racially-discriminatory policy of a restaurant located in a publicly-owned building held unconstitutional in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, the federal grants here do not benefit the Jaycees but on the ultimate recipients of the funds.

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[4]In *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), affirmed *sub nom. Coit* v. *Green*, 404 U.S. 997, the Section 501(c)(3) exemption of segregated private schools was successfully challenged. However, *Green* was not decided on "state action" grounds but on the basis of the meaning of the term "charitable" as used in Sections 170(c) and 501(c)(3) of the Code.

[5]For example, petitioners refer (Pet. No. 73-2025, pp. 7-8; Pet. No. 73-2028, p. 3) to grants and contracts awarded the Jaycees by the Department of Health, Education, and Welfare, the Office of Economic Opportunity, the Department of Housing and Urban Development and the Department of Labor. The programs funded by such grants include such diverse civic-oriented activities as counseling Job Corps returnees, criminal justice programs, construction of low-cost housing projects, and public education on such subjects as alcohol abuse, venereal disease, danger of poisons, child abuse, etc.

With one exception,[6] petitioners do not allege that there is any discrimination with respect to the actual administration of these federally-funded programs, insofar as recipients or beneficiaries are concerned. Rather, they urge only that women have been deprived of the leadership training and experience involved in participating with the Jaycees in the administration of such programs.

Contrary to petitioners' argument (Pet. No. 73-2025, pp. 21-22; Pet. No. 73-2028, p. 12), the decision below does not conflict with *Jackson* v. *Statler Foundation*, 496 F. 2d 623 (C.A. 2), as to the federal respondents. *Jackson* held only that the plaintiff had standing to challenge state (and federal) tax exemptions of 13 charitable foundations because of alleged racially-discriminatory policies--a question the decision below did not discuss in dismissing petitioners' suit against the federal respondents. Compare *Cattle Feeders Tax Committee* v. *Shultz*, No. 73-1896 (C.A. 10, decided October 4, 1974), with *Eastern Kentucky Welfare Rights Organization* v. *Simon*, No. 74-1293 (C.A. D.C., decided October 9, 1974). Insofar as the complaint in *Jackson* sought revocation of tax exemptions, the court held that it was deficient on its face for failure to make the New York State Tax Commission and the Secretary of the Treasury parties. The case was remanded for further proceedings to determine whether, under various criteria suggested in the majority opinion, the foundations' affairs were so closely linked to governmental action and support as to

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[6]Petitioners suggest (Pet. No. 73-2025, p. 8) that under the Job Corps program funded by the Department of Labor, the Jaycees counsel only male Job Corps returnees. The record shows, however, that the Job Corps program is designed to assist severely disadvantaged youth of both sexes. While the Jaycee volunteers are asked to assist males, a similar agency called WICS (Women in Community Service) assists the females (Ex. 274).

generate "state action" in their conduct (496 F. 2d at 629).[7] As the majority opinion in *Jackson* noted, its suggested "formulation of [a] definition of 'state action' is applicable only to claims of racial discrimination" (496 F. 2d at 635). At all events, however, there is no reason to believe that the court below applied substantially different criteria here, or that the application of those criteria would lead to a different result in this case.

2. The dismissal of petitioners' action against the federal respondents can also be supported on the alternative ground that petitioners lacked standing to sue these governmental officers and agencies. As this Court has recently reaffirmed, the doctrine of standing requires that the complaining party suffer a concrete injury caused by the action challenged as unlawful. See, *e.g., Schlesinger* v. *Reservists Committee to Stop the War,* No. 72-1188, decided June 25, 1974; *Laird* v. *Tatum,* 408 U.S. 1, 12; *Data Processing Service* v. *Camp,* 397 U.S. 150. While standing may exist where injury and causative action are only tenuously linked (see *United States* v. *SCRAP,* 412 U.S. 669, 686-690), there is no showing that the Jaycees' tax-exempt status and their administration of various federal programs caused or in any manner reinforced their "males only" membership policy, which the petitioners assert has

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[7]Judge Friendly, joined by Judges Hays and Mulligan, filed an extensive opinion dissenting from the court's denial of a motion for reconsideration *en banc*. That opinion emphasized the distinction between seeking relief against governmental involvement and relief against the foundations themselves. Judge Feinberg also dissented.

injured them. Indeed, the relief sought by petitioners against the federal respondents would not necessarily result in the admission of women to the Jaycees.

Those petitioners who are taxpayers also lacked standing to sue as such, since they failed to establish the required "logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 102; *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*; *United States* v. *Richardson*, No. 72-885, decided June 25, 1974. Petitioners' challenge was not addressed to the taxing and spending power of Article I, Section 8 of the Constitution and petitioners have made no claim with respect to the federal grants that the funds were being spent in violation of a "specific constitutional limitation upon the * * * taxing and spending power * * * " (392 U.S. at 104). Moreover, the real purpose of their suit is not to reduce federal expenditures or increase revenues, but to change the Jaycee membership policies.

Finally, to the extent that petitioners sought injunctive and declaratory relief against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Internal Revenue Service concerning the tax-exempt status of the Jaycee organizations, the suit is barred by the Anti-Injunction Act (Section 7421 of the Internal Revenue Code) and the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201). Those two provisions respectively prohibit suits "for the purpose of restraining the assessment or collection of any tax" or declaratory suits "with respect to Federal taxes." Compare *Bob Jones University* v. *Simon*, No. 72-1470 and *Alexander* v. *"Americans United" Inc.*, No. 72-1371, both decided May 15, 1974.

For the reasons stated, the petitions for writs of certiorari should be denied with respect to the federal respondents.

Respectfully submitted.

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OCTOBER 1974.

DOJ-1974-10

Appendix B

§ 301. Jurisdiction over persons, property or status

A court may exercise such jurisdiction over persons, property or status as might have been exercised heretofore.

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

(b) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellants' Reply Brief was served on Appellees by mailing two copies thereof to:

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this 31st day of October, 1974.

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November 1, 1974

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Re: The United States Jaycees, Inc., et al
v. The New York City Jaycees, Inc.'
(Docket No. 74-1916)

Dear Mr. Fusaro:

Inadvertently, Appellants' Reply Brief was mailed for filing with the Court without the requisite gray cover. Please substitute the enclosed copies.

Sincerely yours,

Virginia M. Dondy

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VMD/jf

Enclosures